United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1115

76-1116

ORIGINAL

To be argued by
MICHAEL LESCH

In The

United States Court of Appeals

For The Second Circuit

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES E. CORR, III, et al.,

Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York.

REPLY BRIEF FOR DEFENDANT-APPELLANT JAMES E. CORR III

SHEA GOULD CLIMENKO & CASEY
Attorneys for Defendant-Appellant
James E. Corr III
330 Madison Avenue
New York, New York 10017
(212) 661-3200

MICHAEL LESCH
RONALD H. ALENSTEIN
RICHARD F. CZAJA
Of Counsel

(9643)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 76-1115 and 76-1116

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES E. CORR, III,

Defendant-Appellant.

DEFENDANT-APPELLANT
JAMES E. CORR, III'S REPLY BRIEF

PRELIMINARY STATEMENT

This brief is submitted on behalf of James E. Corr, III ("Corr"), defendant-appellant herein, for the purpose of replying to some of the factual statements and legal arguments made by the government in its brief.

REPLY TO STATEMENT OF FACTS

Approximately forty pages of the prosecution's brief is devoted to its Statement of Facts. A statement of facts of this length is entirely superfluous in view of the issues raised on this

appeal. Thus, appellant Corr, in his brief on appeal to this Court ("main brief"), does not contend that there was insufficient evidence to submit the charges against him to the jury except with respect to counts 2 through 9 of indictment 75 Cr. 803, which relate solely to the issue whether Corr was in control of Jerome Mackey's Judo, Inc. ("Judo") (main br., Point II).

Since the prosecution's Statement of Facts is largely irrelevant to the issues in this appeal, we will make only limited comment upon it.*

In its Statement of Facts, the prosecution has seen fit to bring to the attention of this Court the alleged "losses of millions of dollars to the investing public and to brokerage houses" as a result of the alleged conspiracy (government's br., p. 4) and the alleged fact that "Corr...received into his bank accounts over $1.1 million from the sale of Judo securities..." (government's br., p 7). While the prosecution has consistently maintained that such "facts" are an important part of its own case (main br., pp. 17-19), it continues to argue that evidence introduced by Corr of his own losses on his investment in Judo was properly excluded by the trial judge (Reply to Point IA, infra).

Perhaps the most glaring misstatement in the prosecution's Statement of Facts is its contention (government's br.,

---

* We note that the section of the Statement of Facts entitled "Synopsis" (government's br., p. 5) might more properly be included in the section entitled "The Government's Case" (government's br., p. 9).

p. 30) that "On October 17, 1972, Corr instructed [Bruce] Buschbaum to purchase 7,700 additional shares of Judc...for... (Corr's) account" which Corr never paid for. The overwhelming evidence adduced at trial was to the contrary. Buschbaum acknowledged that he told his employer Sterling Grace and Sterling Grace's insurer that the order in question was not authorized by Corr (Tr. 590-591).* Robert Lebo, Executive Vice President of Sterling Grace testified [confirming Corr's testimony (Tr. 3886)] that the shares in question were taken out of Corr's account and that Corr was never asked by Sterling Grace to pay for them (Tr. 4012).

Many of the other contentions contained in the prosecution's Statement of Facts were denied by Corr when he took the stand and are based solely on the prosecution's view of the evidence.

---

* Numbers in parentheses followed by "a" refer to the appendix; preceded by "Tr." to the transcript; and preceded by "Ex." to government's exhibits. Letters preceded by "Ex." refer to defendant Corr's exhibits.

REPLY TO POINT I

THE TRIAL COURT'S EXCLUSION OF EVIDENCE, BY PREVENTING APPELLANT FROM PRESENTING A FULL DEFENSE TO THE CHARGES, UNCONSTITUTIONALLY IMPAIRED HIS RIGHT TO A FAIR TRIAL

In Point I of his main brief, the defendant Corr argues that certain rulings by the trial judge deprived him of his constitutional right to present a full defense to all the charges against him. Thus, the prosecution's statement that "Corr does not seek to overturn on appeal his conviction on Counts 1, 2, 9, 11 and 12 of Indictment 75 Cr. 1059" (government's br., p. 41, fn. (**)) is incorrect. In addition to Point I, Points IV and V of appellant Corr's main brief relate to all counts of both indictments herein (see main br., p. 66).

Both the prosecution (Tr. 4936-4937) and the defense (Tr. 5211-5212) acknowledged that the counts in both indictments were inextricably linked in that acquittal required the jury to find credible the testimony of the defendant Corr. Fundamentally, Corr now argues on appeal that numerous rulings by the trial judge prevented him from supporting the details of his story and showing its truth, and also demonstrating the untruth of the testimony of various government witnesses, and thus prevented him from presenting a full defense to the charges against him (main br., Points I, V).* This error tainted his conviction

---

* In particular, counts 1, 2, 9, 11, and 12 of indictment 75 Cr. 1059 (the convictions which, according to the prosecution, Corr does not seek to overturn) all involve conflicts between Corr's version of various conversations and that of government witnesses.

on all counts submitted to the jury.

Thus, in United States v. Cantone, 426 F.2d 902 (2d Cir. 1970), cert. denied 400 U.S. 827 (1970), the appellant alleged (as does appellant Corr in the instant appeal (main br., Point IV A)) that the Pinkerton charge had been erroneously given to the jury. This Court agreed with appellant's contention and thus reversed his conviction on the substantive counts. The Court then reversed appellant's conviction on a conspiracy count, even though the Pinkerton charge did not directly relate to the verdict on that count, stating:

> "The trial judge's erroneous submission to the jury of the issue of Rosen's guilt on the substantive count and the giving of the Pinkerton charge undoubtedly influenced the jury's finding of Rosen's guilt on the conspiracy charge. We conclude that the errors with respect to the substantive count so tainted Rosen's conspiracy conviction that we must also reverse that count." (426 F.2d at 905).

Similarly it is submitted that in the instant case the various errors by the trial judge "undoubtedly influenced the jury's finding[s]" on all counts submitted to them, including counts 1, 2, 9, 11 and 12 of Indictment 75 Cr. 1059.

The prosecution seeks to characterize various rulings of the trial judge involved in the instant appeal as matters properly within the trial court's discretion (government's br. pp. 42-43). It is submitted that the rulings complained of, considered both individually and cumulatively,

far exceeded any discretionary power a trial judge may possess in evidentiary matters.

Thus, in the single instance of the exclusion of the proffered testimony of Lewis Braff ("Braff") (main br., pp. 16-22), it is submitted that the rulings of the trial judge "effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." See Webb v. Texas, 409 U.S. 95, 98 (1972) . It cannot seriously be maintained that the exclusion of a demonstrably essential defense witness (main br. pp. 16-22) is a matter within the discretion of the trial judge. Johnson v. Johnson, 375 F. Supp. 872, 876 (W.D. Mich. 1974).

The decision in Hamling v. United States, 418 U.S. 87 (1974), relied upon by the prosecution (government's br., pp. 42-43) is hardly persuasive in the instant case. In Hamling, the Supreme Court, in upholding a trial judge's exclusion of certain documentary evidence, specifically noted that the trial judge had permitted the defense to elicit testimony from four expert witnesses on the same subject (418 U.S. at 125). In the instant case, the trial judge's rulings effectively prevented Corr's sole expert witness, Braff, from offering testimony which he uniquely could provide (main br., pp. 16-22).

We now turn to a discussion of the specific points raised by the prosecution.

A. Limitations on the Testimony of Lewis Braff

The trial judge did not permit Corr to offer evidence through Braff, a certified public accountant, as to Corr's losses on purchases of Judo stock assumed when members of the "Ventura group" failed to repay loans for the purchase price (305a-309a). The government now asserts that such investment is "in no sense . . . indicative of [Corr's] good faith." (government's br., p. 44). Thus, the government asserts that the stock securing a loan is a matter of indifference to the lender. It is submitted that Corr's conduct in making loans secured by Judo stock and then assuming the purchases when the loans were not repaid indicates a belief in the value of that stock inconsistant with a fraudulent intent to manipulate its price.

The prosecution further asserts that with regard to the exclusion of Braff's testimony, "Judge Weinfeld properly declined to allow Corr to have it both ways." (government's br. p. 44). As was demonstrated in our main brief (although inconsistent lines of defense are entirely permissable (United States v. Keogh, 440 F.2d 737, 747 n. 12 (2d Cir. 1971) cert. denied 404 U.S. 941 (1971)), Corr in no sense is attempting "to have it both ways." (main br., p. 21). Rather as the prosecution concedes, it is the

government which is trying to have it both ways, asserting on the one hand that "it was Corr, with his own funds and for his own beneficial interest, who was trading in Judo through the accounts of the loan recipients" (government's br., p. 44) while at the same time arguing that losses on the Judo stock purchased through the accounts are not evidence of Corr's good faith.

With regard to the exclusion of Braff's testimony regarding Corr's loss on his investment in Judo franchises (main br., pp. 20-21), the prosecution argues that such evidence was "wholly irrelevant" to the offense charged, manipulation of the price of Judo's stock (government's br., p. 44). Yet, as the trial judge correctly charged, manipulation is a question of intent (Tr. 5367-5368), and it is submitted that Corr's investment in Judo franchises demonstrates a belief in the underlying merits of Judo that is inconsistent with an intent to manipulate the price of the stock.

The excluded evidence of losses incurred after June 1973 (main br., p. 20), contrary to the government's assertion (government's br., p. 45), was highly probative in that it indicated Corr's continuing posture of being an investor in Judo rather than a manipulator of the price of its stock.

Finally, the prosecution argues that the Braff testimony was properly excluded because evidence of losses could have been introduced through Corr and (in some unexplained manner) through Corr's counsel (government's br., pp. 44-45). As noted in appellant Corr's main brief (p. 22), testimony by the defendant cannot conceivably substitute for that of a qualified expert. See United States v. Delli, 472 F.2d 340, 385 (7th Cir. 1972).

As to the prosecution's assertion regarding Corr's counsel's ability to make arguments to the jury regarding losses (government's br., p. 45), the exclusion of Braff's testimony completely undercut counsel's ability to make such an argument. Counsel for Corr had stated in his opening remarks:

> "James Corr invested hundreds of thousands of his own money in these franchise programs...
> "You are going to hear about lots of people who lost money in this case, I suppose, but you won't hear of any person that lost more money that Mr. Corr, who is supposed to be the arch villain in this case." (Tr. 38-39).

But exclusion of the evidence described above in combination with the other restrictions imposed on the Braff testimony rendered it impossible to demonstrate that Corr must have been the largest single loser in the demise of Judo, and thus completely undercut counsel's credibility in the eyes of the jury on the subject of defendant's losses.

Again it is submitted that even considered apart from the other issues raised in the instant appeal, the exclusion of the Braff testimony requires a new trial on all counts submitted to the jury.

B. Exclusion of the SEC Release

The defendant Corr offered in evidence an SEC release (356a) dealing with the results of that agency's investigation into trading in Judo. The trial judge sustained the government's objection to the release (main br., pp. 22-24). The release was offered in connection with the section 5 charges, to show that the stock involved was freely tradeable , as the SEC found, or at least that on the facts a reasonable person in Corr's position could so have believed.

The government (brief at 45-46) asserts that the release does not fall within the hearsay exception provided for by Rule 803(8)(c) of the Federal Rules. In making this assertion, the prosecution attempts to import a requirement into Rule 803(8)(c) that findings admitted under it "represent a final determination of facts obtained after administrative proceedings" (government's br., p. 45). Such a requirement is utterly without support in the text of the Rule and the government does not cite any other authority for this supposed requirement.*

---

* The government states that Corr "suggests" in his brief that the SEC release meets the prosecution's purported criterion of being a "final determination of facts obtained after administrative proceedings" (government br., p. 45). The statement is simply incorrect. Though it is irrelevant to the question of admissability under Rule 803(8)(c), the SEC release would in fact represent a final determination as it terminated the suspension of trading in Judo stock (356a).

Contrary to the prosecution's assertion (government br., pp. 45-46) the document contains numerous factual findings. The hearings held by the SEC before the release was issued were the subject of a stipulation entered into by the prosecution and the defense (221a-223a). In fact, the government itself while arguing for the exclusion of the release, relies on testimony in the underlying hearings as evidence of Corr's alleged control of the management and policies of Judo (government's br., p. 57; Reply to Point II, infra).

The government further suggests that the release "may well have been affected by Corr's misleading and false testimony before the [SEC] in June and July 1973" (government br., p. 46). The prosecution did not make such a suggestion at the time the SEC release was offered into evidence (254a), since at that time Corr had not been convicted of making false statements before the SEC. The government having opposed severance of the false statement counts from the remainder of the case (affidavit of Ira Lee Sorkin, Esq. in support of the government's motion to join the trials of 75 Cr. 803 and 75 Cr. 1059) must bear the burdens as well as the benefits of such joinder. In particular, the government cannot use a false statement conviction entered in the same trial after the offering of the SEC release to justify its exclusion. Finally, examination of Corr's allegedly false statements (69a-88a) indicates that they did

not bear on the issue of control.

It is submitted that the prosecution's assertion (government's br., p. 46) that "we fail to discern how Corr can possibly conclude from the release that it is relevant to the issue of whether he was a control person" is disingenuous. The government cannot seriously contend that the individual referred to in the release was not Corr; the only other holder of shares of the magnitude involved in the release was Mackey who owned 600,000 (Ex. E, p. 4) not 250,000 shares. Furthermore the release is not merely "relevant" to the issue of control but flatly states that Corr's shares were "available for public trading" i.e. not held by a control person. The terms "public float" and "available for public trading" do not include restricted stock held by control persons, both as used generally (Competitive Associates, Inc. v. International Health Services, Inc., CCH Sec.L. Reptr. 1974-1975 Dec., ¶94,966, p. 97,327 (S.D.N.Y. 1975)) and as used specifically in the release [since Mackey's shares were not included (main br., p. 23 fn.)].

Accordingly, the release fell squarely within Rule 803(8)(c) and was highly relevant to Corr's defense.

C. Exclusion of Evidence Relating to Mackey's Pending Sentence for Mail Fraud.

The prosecution asserts that a letter from the United States Attorney for the Eastern District of New York to Judge Weinstein, regarding the seriousness with which the United States viewed Mackey's conviction for the crime of mail fraud in the Eastern District (348a, main br., pp. 24-26) was "irrelevant or, at best,merely cumulative" on the issue of Mackey's motivation to provide testimony favorable to the prosecution. It is submitted that whatever the motivation of a convicted felon awaiting sentencing to provide testimony favorable to the government, such motivation is significantly enhanced when the United States Attorney for the Eastern District writes a letter to the sentencing judge describing his offense as "a major fraud case" and recommending incarceration (349a), and the felon is then offered an opportunity to testify for the United States Attorney in the Southern District (see 92a, 350a-351a). Under the circumstances, the defendant should have been allowed to bring the United States Attorney's letter to the attention of the jury. United States v. Masino, 275 F.2d 129, 132 (2d Cir. 1960). United States v. Leonard, 494 F.2d 955, 962-963 (2d Cir. 1974).

D. Exclusion of Testimony Regarding the Relationship of Leroy and Jean Goldfarb to the Underwriters Bank & Trust Co.

The defendant Corr contended that the government witness Jean Goldfarb had signed Kathleen Keogh's name on certain loan documents (Ex. 40, 44 and 66) and then testified falsely that Corr had requested her to do so (main br., pp. 26-28). Had Corr been able to establish this proposition, he would have been acquitted on count 34 of indictment 75 Cr. 803 (EW). However, the question of whether Corr requested Jean Goldfarb to sign Keogh's name on the loan documents had an importance beyond count 34 and was in fact the central test of Corr's credibility in the entire case. In the case of no other testimony was the conflict between Corr (Tr. 3795-3820) and two government witnesses (Jean Goldfarb (208a-214a) and John Coyne (188a,192a)) so sharp. Without establishing a motivation for Jean Goldfarb to testify falsely, Corr could not hope that the jury would believe his testimony relating to the other counts in the case.

The defense was precluded from eliciting testimony from John Coyne and Corr which would have shown Jean Goldfarb's motivation to sign the loan documents and to testify falsely (main br., p. 28). However, the prosecution's principal argument to justify this exclusion of evidence appears to be its unsupported belief that the defense could have elicited similar testimony from Jean Goldfarb's husband, Leroy, who was not called as a witness by either side. Clearly both

sides had reasons for not calling Leroy Goldfarb. From the point of view of the defense, the possibility that Leroy Goldfarb would testify that his wife perjured herself could be described as remote at best. In addition, had the defense elicited the excluded testimony, the prosecution could have made its argument regarding the failure to call Leroy Goldfarb to the jury. Also [as Judge Weinfeld stated (Tr. 4423-4424)], arguments regarding the alleged "absurdity" of the defense contentions could properly have been made to the jury (main br., pp. 28-29).

E. Exclusion of Testimony by Richard Sobel

As discussed in appellant Corr's brief (pp. 29-32), the excluded Sobel testimony was essential to demonstrate the pressures on witnesses to testify favorably to the prosecution, and the pressure on Sobel to change his testimony to make it favorable to the government. The government asserts that such questioning would have been unnecessarily cumulative (government's br. p. 51) yet the excluded questioning related to the very point at issue -- whether Sobel's indictment was what caused him to change his testimony to accuse Corr of a payoff not previously testified to:

> "Q. After the indictment came down did you have a conversation with Mr. Salant in which you told him in words or in substance that you found it rather surprising that you had been indicted as a defendant and that he had not been indicted?
>
> A. Yes, I did.

Q. Did he tell you in words or in substance that the reason that you had been indicted and he hadn't was because he had testified about ar option?

A. No, he did not say it. He did not say that.

BY MR. LESCH:

Q. Did there come a time when you heard that?

MR. SORKIN: Your Honor, again I am going to object. I don't see the relevance.

THE COURT: Let him finish his question, please.

MR. LESCH: That is my question, did there come a time when you heard that.

THE COURT: Objection sustained.

Q. Did there come a time, sir, when it came to your attention or your understanding the reason that Mr. Salant had not been indicted as a defendant and the reason you had been indicted as a defendant was that Mr. Salant had said to the grand jury that Mr. Corr had offered you an option?

A. I only assume that.

MR. SORKIN: Mr. Sobel, let me make my objection and let the Court rule.

THE COURT: Objection sustained.

MR. LESCH: Your Honor, may I approach the bench on this.

THE COURT: No, it is perfectly clear what you are inquiring into. There is no need for a side bar conference.

Q. Did your lawyer ever tell you that that was the reason, sir?

MR. SORKIN: Objection, your Honor.

THE COURT: Objection sustained.

Q. Well, as you sit here today, is that your understanding that you were named as a defendant?

MR. SORKIN: Objection.

THE COURT: I hold this witness' understanding as to why he is a defendant in this case is not a proper question and please refrain from this area of inquiry. The grand jury makes the determination as to whom to indict and whom not to indict. This witness' understanding has nothing to do with it. I foreclose any inquiry into it. Please proceed to another subject. Your exception is noted."

(178a-181a).

We submit that for the reasons outlined in appellant Corr's main brief (pp. 29-32), the termination of the cross examination of Sobel on this subject constituted a denial of the right to effective cross examination and thus was "constitutional error of the first magnitude" which "no amount of showing of want of prejudice" can cure. Davis v. Alaska, 415 U.S. 308, 318 (1974) quoting Smith v. Illinois, 390 U.S. 129, 131 (1968) and Brookhart v. Janis, 384 U.S. 1, 3 (1965).

F. Exclusion of Testimony by Chajet.

The prosecution justifies the limiting of questioning of the government witness Barry Chajet ("Chajet") with regard to SEC investigation of him by reference to the "fact" that there were no such investigations (government's br., p. 52). This representation is made for the first time in the government's brief on appeal and has no basis in the record. "Facts" referred to in a brief which are not part of the record are of course entitled to no weight whatever in this Court's determination of the merits of an appeal. Schley v. Pullman Car Co., 120 U.S. 575, 578 (1887). Bono v. United States, 113 F.2d 724,

725 (2d Cir. 1940).*

Restricting ourselves to material in the record, there was ample basis for questioning Chajet regarding SEC investigations of his activities.

First, the questioning immediately preceding the excluded question, strongly indicated that Chajet was either the subject of an SEC investigation or may have feared that he would become the subject of such an investigation:

> "Q. Now, in connection with those stocks, was there a Securities & Exchange investigation at Morgan, Kennedy?
>
> A. I believe only involving Textured Products, that I recall.
>
> Q. Did you testify at that SEC investigation?
>
> A. No, sir.
>
> Q. You testified before the SEC in a number of matters unrelated to Jerome Macey's Judo?
>
> A. Only one.
>
> Q. Which one was that?
>
> A. None of those.
>
> Q. Would you care to give me the name, sir?
>
> A. It involved a stock called Bellair Financial.
>
> Q. When was that?
>
> A. About two or three months ago.

---

* Even accepting the prosecution's assertion, the relevant fact bearing on Chajet's motivation to provide testimony favorable to the government is not whether such investigations did in fact exist but Chajet's belief as to their existence. The prosecution does not (and of course could not) make a representation as to Chajet's beliefs on this subject.

Q. Were you also investigated by the SEC?

MR. SORKIN: Objection, your Honor.

THE COURT: He didn't say he was investigated. He said he was a witness.

Q. Were you investigated by the SEC in connection with that stock?

MR. SORKIN: Your Honor, I object.

THE COURT: Objection sustained."

(125a-126a).

Second, the agreement entered into between Chajet and the government (342a-344a) refers to "activities of [Chajet] and others in all matters which the government is investigating" (main br., pp. 32-33; emphasis added). Defense counsel was clearly entitled to inquire into this language, despite the government's present (and belated) assertion that it was mere surplusage.

G. Failure to Require the Government to Make Available Material Relating to Coyne.

With regard to this point, we invite the Court's attention to the discussion in appellant Corr's main brief (pp. 33-34).

For all the reasons discussed above and in Point I of the main brief, these rulings of the trial judge prevented the defendant Corr from presenting an effective defense to the charges against him.

REPLY TO POINT II

COUNTS TWO THROUGH NINE OF INDICTMENT 75 CR. 803 (EW) SHOULD HAVE BEEN DISMISSED FOR INSUFFICIENT EVIDENCE

In Point II of his main brief, the defendant Corr argues that counts two through nine of indictment 75 Cr. 803 (EW) should have been dismissed for insufficient evidence that Corr was a control person of Judo.

Initially, we note that even under the prosecution's view of the evidence taken in its brief, the evidence showed only that "Corr. . . exercised very considerable independent authority for the conduct of Judo's affairs and, . . . greatly influenced the authority exercised by [Mackey]." (government's br., p. 55). We submit that exercising very considerable independent authority for the conduct of a company's affairs and greatly influencing the authority exercised by another falls far short of possessing "the power to direct or cause the direction of the management and policies" of a corporation (Rule 405 promulgated under the Securities Act of 1933 (17 C.F.R. §230.405)).

Defendant Corr does not assert that Mackey's status as Judo's majority shareholder necessarily determines the control issue. Rather this fact is merely one aspect of the overwhelming and uncontradicted evidence (main br., pp. 35-39) that government witness Mackey was (by his own testimony) the sole person "in charge of the management and policy of Judo. . . " (115a-116a).

The government's assertion that Corr had authority to bind the corporation is unsupported by the evidence. Rather the uncontradicted evidence was to the contrary: (1) the letter of intent in the TS&S acquisition [cited by the prosecution as evidence of Corr's control of Judo (br., p. 56)] was signed by Mackey,not Corr (352a); (2) the investment banking contract between Judo and Morgan Kennedy [again cited by the prosecution (government's br., p. 56)] was to be signed by the "President" of Judo (Mackey) (Ex. V). (It apparently was never signed.); (3) the hiring of Corr's brother, Raymond Corr, had to be approved by Mackey (136a); (4) the hiring of a financial public relations consultant, Steven Greenberg, was required to be similarly approved (219a); (5) the general manager of Judo (Raymond Gould) testified that advertising contracts, equipment purchases and leases were made solely by Mackey (312a-313a); and (6) Corr's own employment by Judo was abruptly terminated when he was subpoenaed to appear before a grand jury (241a).

It is submitted that the other activities cited by the prosecution such as participating in the effort to retain Judo's NASDAQ listing, talking with Russell Wayne and other members of the financial community, and working on the franchise program cannot conceivably be said to indicate control by Corr of the management and policies of Judo. Corr concedes that he was a substantial stockholder of Judo and thus was interested in its fortunes. Corr concedes that the was an employee of Judo and as such performed certain functions

on the corporation's behalf. Yet short of a rule making every employee of a corporation a control person of that corporation, such activities do not demonstrate Corr's control of Judo.

Finally, we note that the prosecution in pointing to evidence of control places substantial reliance on Corr's SEC testimony (government's br., p. 57). However, the SEC release based on this testimony (356a), which the defendant Corr was not allowed to enter into evidence (main br., pp. 22-24; Point I B, supra), indicates that after hearing this testimony the SEC found that Corr was not a control person of Judo. While we submit that the SEC testimony, for the reasons discussed above, is not evidence of control by Corr of the management and policies of Judo, we further submit that the prosecution should not be allowed simultaneously to rely on such testimony and argue that the SEC release was properly excluded.

REPLY TO POINT III

COUNTS FOUR, SIX, SEVEN AND TEN OF INDICTMENT 75 CR. 1059 (EW) SHOULD HAVE BEEN DISMISSED

In Point III of his main brief, the defendant Corr argues that counts four, six, seven and ten of indictment 75 Cr. 1059, charging him with violation of 18 U.S.C. §1001, should have been dismissed on the grounds that the allegedly false answers were (in the case of count four) unresponsive and (in the case of counts six, seven and ten) the result of questioning which was insufficiently precise. Bronston v. United States, 409 U.S. 352 (1973).

As to count four, the prosecution contends that United States v. Adler, 380 F.2d 917, 922 (2d Cir.) cert. denied, 389 U.S. 1006 (1967) holds that unresponsive statements may be the subject of a false statement prosecution under 18 U.S.C. §1001. However we submit that there is a world of difference between an unresponsive answer given in an inquisitorial setting and the type of voluntary statement involved in the Adler case. In Adler, the defendant on his own initiative walked into an FBI office and falsely stated that government officials were demanding bribes from him. The defendant later acknowledged to an FBI agent that he did this in order to "get even" with government personnel (380 F.2d at 920).

In contrast to the situation in Adler, Corr under subpoena testified for three days before the SEC in

connection with an investigation by that agency into trading in Judo securities (221a-223a). Thus, there was ample opportunity for the Commission's attorneys having received an unresponsive and allegedly false answer, to question Corr more closely about his assertions in that answer, i.e. "to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examinations." (Bronston, supra, 409 U.S. at 358-359). Having failed to pursue such an inquiry, the government cannot now indict Corr for alleged falsehoods in a concededly unresponsive answer. United States v. Cobert, 277 F. Supp. 915 (S.D. Cal. 1964).

As to count six, appellant Corr contends that his allegedly false answers are demonstrably true, despite the government's strained view of what constitutes "maintenance" of a brokerage account (main br., pp. 42-49). The tortured construction which the prosecution puts upon the notion of maintenance is again evidenced in the government's brief which states that Sonberg testified that he did not maintain brokerage accounts. (government br., p. 61). Actually Sonberg testified as follows regarding brokerage accounts in his name:

> "Q. As far as you were concerned, sir, was it your understanding that you owned this stock that was on these--that is reflected on these [brokerage] statements?
>
> A. Yes.
>
> Q. Was it your understand [sic.] that Mr. Corr was buying this stock for you, Joseph Sonberg, and you were the owner of the stock, not Mr. Corr?
>
> A. Yes."
>
> (Tr. 1468-1469).

Thus it is submitted that under any reasonable construction of the term "maintenance" Sonberg testified that he did maintain brokerage accounts.

The government further contends that transfers of funds from Sonberg's to Corr's account contradicted Corr's SEC testimony regarding disbursements from Sonberg's account. First, as discussed in appellant Corr's main brief, the net effect of his testimony regarding disbursements from Sonberg's account was ambiguous (main br., p. 48) and thus insufficient under Bronston to support a false statement count. Second, Corr testified that he did not consider funds to be disbursed from Sonberg's account if (regardless of the mechanics of the transaction) the funds were used to purchase other stock which belonged to Sonberg (Tr. 3840).

As to count seven (main br., pp. 49-51), the prosecution asserts that the falsity of Corr's testimony regarding his and Keogh's "joint" ownership of certain brokerage accounts is demonstrated by Keogh's testimony "that she had no interest in any property beyond the home" (government's br., p. 62). The prosecution thus seeks to convict Corr of making false statements before the SEC because his view of a complicated question of Florida law does not happen to coincide with that of Keogh. In contrast to Keogh, Corr testified that he regarded the accounts as "joint" because he considered himself to be under an obligation to pay Keogh half of their value (Tr. 3772-3775).

The prosecution points to checks issued from accounts in Keogh's name as indication of the alleged falsity of Corr's statement that "[T]hey [checks] would be like debit balances." (government's br., p. 62). Yet, Corr followed this statement in his answer by saying "I hardly ever sold where we didn't make a substitution . . . almost in every case we made substitutions." (main br., p. 50). Corr testified that the checks relied upon by the government represented these "substitutions" i.e. sales followed by purchases of stock in which Keogh maintained an ownership interest (Tr. 3774-3775). Thus, as pointed out in appellant's main brief (p. 51), Corr's statement does not conflict in any way with the government's contention that checks from the Keogh accounts were deposited in bank accounts in Corr's name.

As to count ten (government's br., pp. 62-63), we respectfully refer the Court to the discussion in appellant's main brief (pp. 51-52). In particular, we submit that the government under Bronston, was required to follow up Corr's answer that he "didn't believe" he made price projections with more precise questioning as a predicate to a false statement prosecution.

REPLY TO POINT IV

ERRORS IN THE TRIAL JUDGE'S CHARGE TO THE JURY REQUIRE A NEW TRIAL

A. The Pinkerton Charge

Appellant Corr submits that in view of recent decisions by this Court discussing the Pinkerton charge, [United States v. Bermudez, 526 F.2d 89, 98-99 (2d Cir. 1975), United States v. Miley, 513 F.2d 1191, 1208-1209 (2d Cir. 1975), cert. denied -- U.S. -- (1976), United States v. Sperling, 506 F.2d 1323, 1341-1342 (2d Cir. 1974), cert. denied 420 U.S. 962 (1975)] it was error to give the charge in the instant case (main br., pp. 52-54).

Thus we note that in Miley, supra, relied upon by the prosecution (government's br., p. 64), Judge Friendly repeated this Court's admonition in Sperling regarding the Pinkerton charge:

> "Appellants also assert that they were prejudiced by the reading of the Pinkerton charge, Pinkerton v. United States, 328 U.S. 640, 645, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), which permits a jury to find a defendant guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy. As appellants point out, we recently cautioned against giving the charge as a matter of course in United States v. Sperling, supra, 506 F.2d at 1341-42. Apart from the lack of specific objection to this charge, as distinguished from the general objection to the single conspiracy theory, and the consequent question whetner the point is available on appeal under F.R.Crim.P. 30, the reason why the Pinkerton

> charge was inappropriate as to many defendants in Sperling - that in effect it was the conspiracy that in some instances must be inferred largely from the series of criminal offenses committed - is much less applicable here. Furthermore, our warning in Sperling about over-use of this charge was not given until after this trial was held. Finally, we cannot believe that convictions on any of the substantive counts were procured by the Pinkerton charge. While the Government requested the charge, its case with respect to the substantive counts did not stress an agency theory. . . While the Pinkerton charge was thus unnecessary it was not prejudicial." (footnotes omitted) 513 F.2d at 1208-1209.

The reasons why the Court in Miley found the Pinkerton charge not prejudicial are not present in the instant case. (1) Specific objection was made to the charge with reference to Sperling (Tr. 5429a-5430). (2) As discussed in the main brief (p. 54), the reason why the Pinkerton charge was inappropriate in Sperling applies to the present case. (3) At a minimum the conviction of Corr on counts twenty-seven, twenty-nine and thirty were necessarily obtained on an agency theory (main br., pp. 54-55).

In attempting to demonstrate that Corr was not prejudiced by the Pinkerton charge, the prosecution simply misstates the evidence with regard to count twenty-seven which involved an instance of Judo stock allegedly "parked" by co-defendant William Murphy at the request of co-defendant Bruce Buschbaum. Both Buschbaum (Tr. 575) and Murphy (Tr. 1854) explicitly testified to Corr's non-involvement in the transaction. Yet the prosecution asserts that Murphy informed Corr about this transaction

(government's br., p. 65). We quote the testimony cited by the prosecution in support of this proposition:

> "Q. What did Mr. Buschbaum say to you and what did you say to Mr. Buschbaum, to the best of your recollection?
>
> A. Mr. Buschbaum asked me if I would park his stock in Jerome Mackey's Judo overnight. He said that he had exceeded his dollar limitations of the firm that he had worked for, let him operate with, and that Mr. Corr was unavailable at that time to reach and wanted to know if I would hold the stock overnight, and if I would not retail it, he would buy it back from me because Mr. Corr had customers who would buy it."
>
> (Tr. 1836)

We fail to see how this testimony [much less the prosecution's citation to Buschbaum's testimony (Tr. 528-29)] supports its contention that Corr was informed by Murphy about the transaction involved in count twenty-seven.

Counts twenty-nine and thirty involved "wooden tickets" placed by co-defendant Roger Drayer. The sole evidence the prosecution points to linking Corr with these transactions was double hearsay (government's br., p. 65). The alleged source of Kern's information, Barry Drayer, testified at trial and did not link Corr to the wooden tickets. It is thus submitted that Corr's convictions on counts twenty-seven, twenty-nine and thirty, at the least, were necessarily obtained by the erroneous giving of the Pinkerton charge.

B. Marshaling the Evidence

Appellant Corr contends that (at a minimum as to the substantive counts) the marshaling of the evidence by the trial judge was prejudicial and unnecessary (main br., pp. 56-58). The prosecution purports to find a "central purpose" (otherwise unstated government's br., p. 66) in United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied 384 U.S. 947 (1966) requiring marshaling of the evidence as to the substantive counts. Yet, the rationale of Kelly clearly applies only to the conspiracy count (main br., pp. 57-58). Thus, this Court specifically applied its admonition regarding marshaling in Kelly to "the single overall conspiracy phase of the case" (349 F.2d at 757). The marshaling by the trial judge thus amounted to an unnecessary "second summation" of the prosecution's case against Corr.

REPLY TO POINT V

EVIDENCE RELATING TO ALLEGEDLY "SIMILAR ACTS" BY CORR SHOULD HAVE BEEN EXCLUDED

A. Transactions in American Agronomics Stock

The appellant Corr contends that the testimony elicited by the prosecution from its witness Sonberg regarding transactions in American Agronomics stock (129a-133a) should have been excluded (main br., pp. 61-62).

The prosecution states that one of its purposes in questioning Sonberg regarding the Agronomics transactions was to

demonstrate that Corr was attemtping to gain control of Agronomics (government's br., p. 69). It justifies such a purpose on the grounds that "Corr's entire 'good faith' defense was premised on his claim that he was attempting to gain control of Judo" (government's br., p. 69, fn. [*]). However, Corr asserted that he did not attempt to gain control of Judo until 1973--by which point, due to Mackey's attitude toward him, gaining control represented his sole means of salvaging his investment in Judo franchises (Tr. 3942, 3955-3956). Prior to 1973, Corr's purchases of Judo, while made in good faith, were made as an investment on his part and not as part of an attempt to gain control (Tr. 3638-3639). Even assuming that Corr's defense was that he was attempting to gain control of Judo, the prosecution's evidence regarding the alleged attempt to gain control of American Agronomics would support rather than undercut this defense.

As to the remainder of the government's purported purposes in questioning Sonberg regarding the transactions in American Agronomics stock, examination of the questions posed (129a-133a) indicates an absence of any relationship between the questioning and the purposes now alleged. Rather, the evidence of Corr's transactions in American Agronomics was of no probative value in the instant case, was highly prejudicial to Corr and should have been excluded.

B. The CBWL--Hayden Stone Wooden Ticket

Among the purposes the government asserts for the introduction of the evidence regarding the CBWL--Hayden Stone "wooden ticket", are that it "was clearly probative of [Corr's] relationship to Van Ess...and [of] his continuing course of conduct in attempting to conceal his own transactions in Judo through the accounts of others" (government's br., p. 70). Yet, the government's assertion on these points was that Corr opened accounts in Van Ess's name at Raymond James & Associates, Inc. and the First Commercial Bank in St. Petersburg, Florida, in which he had the concealed beneficial interest and control (government's br., pp. 32-33). Corr would hardly call attention to his allegedly fraudulent use of these accounts by placing an order in Van Ess's account at CBWL--Hayden Stone that he did not intend to pay for.

The other purpose asserted by the prosecution for the introduction of the evidence of the CBWL--Hayden Stone wooden ticket to demonstrate Corr's "attempt to maintain the market price of Judo" (government's br., p. 70)--was shown in appellant's main brief (pp. 62-64) to be fallacious. The government's reliance on United States v. Torres, 519 F.2d 723, 727 (2d Cir.), cert. denied, 44 U.S.L.W. 3344 (Dec. 8, 1975) is misplaced since that case merely restates Fed. R. Evid. 404(b). Since the CBWL-Hayden Stone wooden ticket was of no probative value and was

highly prejudicial to Corr, it should under Rule 404(b) have been excluded.

C. The Chase Manhattan Loan

The prosecution argues that its questioning regarding the Chase Manhattan loan (main br., pp. 64-65) was not prejudicial because "the jury never learned that Corr had filed a false loan application with the Chase Manhattan Bank" (emphasis in original, government's br., p. 71). Yet, after Corr had testified that the proceeds of the loan had not been used to purchase an apartment (261a), and the trial judge had attempted to terminate questioning on the subject, the prosecutor posed the following question to Corr:

> "Q. Mr. Corr, did you make an application to the Chase Manhattan Bank for a $250,000 loan and put down on that application that it was for the purpose of an apartment?"

The prosecution now suggests that because the objection to this question was sustained, the jury was not left with the impression that Corr had filed a false loan application at the Chase Manhattan. Clearly, precisely the opposite was the case, and the allowance of questioning regarding the loan was prejudicial error requiring a new trial.

CONCLUSION

For all of the foregoing reasons, as well as those discussed in appellant Corr's main brief, it is respectfully submitted that a judgment of acquittal should be directed with respect to counts two through nine of indictment 75 Cr. 803 (EW) and counts four, six, seven, and ten of indictment 75 Cr. 1059 (EW) and that a new trial be ordered with respect to all remaining open counts of indictment 75 Cr. 803 (EW) and of indictment 75 Cr. 1059 (EW).

Respectfully submitted,

SHEA GOULD CLIMENKO & CASEY
Attorneys for Defendant
James E. Corr, III
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel

Michael Lesch,
Ronald H. Alenstein,
Richard F. Czaja.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

- against -

JAMES E. CORR III etal.,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 20th *day of* July *19* 76 *at* 1) One St. Andrews Plaza, New York, New York
2) 275 Madison Avenue, New York, New York

deponent served the annexed reply Brief *upon*

1) Robert B. Fiske
2) Joan Goldberg

the Attorneys *in this action by delivering* 3 *true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 20th *day of* July *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer